U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of:

WILLIE WILLIAMS,
Claimant,

CASE NO. 1998-LHC-1200

vs.

OWCP NO. 13-94559

EAGLE MARINE SERVICES,
Self-insured Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

Appearances:

Philip R. Weltin
Oakland, California

Attorney for Claimant

Judith A. Leichtnam
San Francisco, California

Attorney for the Employer

BEFORE: ALEXANDER KARST
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is an action under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (hereinafter "the Longshore Act" or "the Act") brought by the claimant, Willie Williams.

BACKGROUND

The claimant was born on September 21, 1941. TR 7, 32. He moved to the San Francisco bay area and began working on the waterfront in 1963. TR 35-36. The claimant worked on the waterfront for almost 35 years, and had become a "steady"(a longshoreman who works in one position for one employer) for the employer, working primarily as a transtainer operator. However the claimant also often picked up "gravy" positions, in which he could get extra hours and would sometimes work around the clock in a single day. TR 41. During all these years as a longshoreman, the claimant never suffered an injury or missed time because of an injury. TR 70.

The transtainers are giant vehicles used to pick up containers. They have no brakes, and are difficult to control. TR 43-44. On June 22, 1995, the claimant was loading a container, onto the deck of a ship, when another transtainer ran into his transtainer from behind. TR 45-47. He says he was thrown about the cabin. TR 49. When he got up he felt dazed and had to sit down for several minutes, until he was able to climb down from the vehicle. His boss then instructed him to fill out an accident report and see a doctor. TR 50-51.

He went that day to Summit Hospital where he was treated by Dr. Domenick Sciaruto. A report from the visit stated that he complained of pain on both sides of his neck and shoulders. CX A. He was given a soft cervical collar and told to take three days off from work. CX A. He then returned home for a few days, but continued to feel pain up and down his left side. TR 51-52.

On July 24, 1995, the claimant began treatment with Dr. Fred Blackwell. CX C, TR 55. The claimant complained of multiple aches and pains in the back, neck and shoulder with numbness radiating into his hand and left leg. CX C. Dr. Blackwell diagnosed the claimant with musculoligamentous strain and a sprain with possible radiculopathy in the left upper and lower extremities and post-traumatic headaches and sent the claimant for an EMG. CX C.

On July 26, 1995, an EMG was performed by Dr. Jack E. Kundin, which was "abnormal" and showed a mild bilateral carpal tunnel syndrome and abnormalities consistent with, but not absolutely diagnostic of, a left C7 root lesion. CX E.

An MRI was performed on September 13, 1996, which showed mild cervical spondylitic change, disc bulges, and foramina narrowing at numerous levels, and on September 19, 1995, Dr. Blackwell sent him to Dr. Delmar Sanders for an opinion on possible neurosurgery. CX C at 9;

CX D at 26-27.

On November 15, 1995, the claimant visited Dr. Sanders. CX F. He reviewed the MRI which he found to show spondylitic changes, mostly at C6-7 and to a lesser degree C5-6; and reviewed the EMG. It was his impression that the claimant had evidence of cervical stenosis suggesting reasons for a radiculopathic process and possible encroachment of the spinal cord. He discussed with the claimant the significance of his problem and reviewed his MRI with him. He advised the claimant to avoid activities that placed strain on his compromised nerve rootlets and that surgery would probably be necessary for decompression. CX F.

On December 22, 1995, Dr. Blackwell saw the claimant and found him unwilling to have the recommended surgery at that time. CX C. He stated, "[Mr. Williams] still has problems of numbness and radiating pain into his upper extremity. It is my opinion that eventually he will be a surgical candidate, but he is not at this time, psychologically, in a frame of mind to accept that consideration." CX C, TR 328.

On March 27, 1996, the claimant visited Dr. Sanders again. The claimant complained of increasing pain in his arms and increasing numbness and weakness in his arms and hands. Dr. Sanders concluded that the claimant had cervical stenosis with apparent myelopathy. CX F at 34. The claimant continued to receive physical therapy treatments from Dr. Blackwell. However, they did not appear to help, and his condition continued to worsen, until April 3, 1996 at which point he told Dr. Blackwell that he had agreed to have surgery with Dr. Sanders. See CX C at 11-15, TR 329. On May 10, 1996, Dr. Sanders performed surgery, a successful cervical decompression. CX F. The claimant continued to see Dr. Blackwell under a work conditioning program that would last until June of 1997. EX 35 at 22 (deposition of Dr. Blackwell).

In a report of November 4, 1996, Dr. Blackwell expressed concern over the claimant's continuing pain in his lower back and the pain radiating from his neck into his lower extremity; and stated that is was difficult to determine if the pain was radiating from the spine or was isolated in the knee. CX C at 16. In his following report, of November 18, 1996, Dr. Blackwell ordered an MRI for the claimant's knee condition. *Id.* at 17. He also restricted him from returning to his previous job driving the transtainer. EX 35 at 23.

In a following report of January 16, 1997, Dr. Blackwell wrote that because of the claimant's persistent knee problems and neck symptoms, the "probability that he will be able to get back to the water front as a laborer is remote." CX C at 18.

Dr. Blackwell wrote in a report of January 23, 1997,[1] that the knee MRI showed no "evidence of internal derangement which would consider necessity of operative intervention." CX 8 at 19.

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[1] The actual date on this report is January 23, *1996*. However, based on the content of the report, and its sequence between the other reports, the proper date must be in 1997.

Dr. Blackwell then began to notice that Mr. Williams seemed increasingly depressed, first stating in his report of October 18,1997, that the claimant was "most assuredly depressed psychologically. The patient is in need of psychological counseling, and it is my opinion that his depression is affecting the level of his symptoms." CX C at 22. Dr. Blackwell then sent the claimant to see Dr. Gerald A. Davenport, a psychologist.

Dr. Davenport examined claimant on November 19, 1997 and administered a Hamilton Depression Inventory (HDI) test. The results strongly suggested that the claimant was suffering severe depression—his score placed him in the 99 percentile of adults, and he scored on the same scale for melancholy. CX I. Dr. Davenport stated that the claimant was "a very proud, self-sufficient individual who has worked basically all of his life, and he now feels that he is in a position now where he can't take care of himself in a normal fashion." He continued to state that the claimant appeared not only depressed, but to feel hopeless and tired of being in pain. CX I at 64. He concluded that the claimant was clinically depressed and in need of on-going psychotheraphy: "Psychological intervention is a must and should happen immediately." *Id.*

On December 8, 1997, the claimant was seen by Dr. James B. Stark, who prepared a report dated January 5, 1998. CX G. The claimant complained of almost daily left head pain, bilateral shoulder pain, pain numbness and tingling in the entire left arm with occasional numbness. He complained of pain in the left leg and at times in the foot, while his left knee was the most painful area of the leg and occasionally would swell. *Id.* Dr. Stark concluded that the claimant suffered a cervical strain which aggravated a pre-existing multilevel cervical spondylosis with spinal stenosis, and a lower back lumbar strain. CX G at 53-54. He also concluded that the cervical condition was permanent and stationary as of October 30, 1996 and that the lumbar spine became permanent and stationary on January 16, 1997. *Id.* However, he concluded that the claimant did not suffer any specific injury to the left knee. Dr. Stark also concluded that the claimant could not return to certain longshore activities such as driving and activities that required lifting and bending, but that he was capable of returning to work as a clerk or some other dockside work. *Id.*

In his report of February 20, 1998, Dr. Blackwell wrote that the claimant was "clinically depressed" and had "persistent complaints of pain involving the entire left side." CX C at 24. However, Dr. Blackwell felt he could not fill out a disability certificate for this pain because of the "non-organic component to his complaints." *Id.*

On October 2, 1998, Ms. Marci Winkler prepared an employability study report for the employer. EX 16. Ms. Winkler was unable to get permission to interview the claimant, so she based her report on medical records and vocational research. She concluded that there were several alternative jobs available to the claimant within his physical restrictions, including cashier, security guard and telemarketer.

On February 9, 1999, at the request of the employer, the claimant received a psychological evaluation by Dr. David Pope and Dr. Hank Sigal. EX 37, 38. Dr. Pope tested the claimant

extensively, and concluded there were inconsistencies in the test results that indicated the claimant could be malingering and faking his cognitive symptoms, or possibly having an extreme histrionic reaction, or that there could be some combination of the factors. EX 38. Dr. Pope offered the diagnosis of somatoform disorder and mild depression. Dr. Sigal reached similar conclusions, also diagnosing somatoform disorder, mild depression and malingering, but also stated that the industrial accident was one of the causes of the claimant's depression and somatizing. EX 37.

On February 26, 1999, Lorian Ink Hyatt, a vocational rehabilitation counselor with Ink Rehabilitation and Vocational Counseling prepared a Vocational Rehabilitation Survey based on interviews with the claimant on October 21, 1998 and February 26, 1999. CX P.

On February 26, 1999, Marc Joseph Rabideau, a physical therapist, prepared a functional capacity assessment report based on interviews and tests of the claimant conducted on February 16 and 18, 1999. CX O. Mr. Rabideau observed the claimant for two days for 6 to 7 hours each day, reviewed all the medical records in the case and discussed the claimant's condition with Dr. Blackwell. TR 138-139. He extensively measured the claimant's physical limitations by conducting range of motion tests, strength tests, manual muscle testing, walking functional tests such as on a balance board and balance beam, gripping tests, and various lift and carry activities. TR 138-140. Mr. Rabideau concluded that the claimant was "certainly not capable of performing any work as a longshoreman at any time in the future." CX P at 9.

In the three years since his injury, the claimant has never attempted to return to work, and has never attempted to get training to go back to work. TR 115. He testified that he loved working on the waterfront and would go back if he could, but that he now feels lost without his old job. TR 54. Since graduating from high school, the claimant has only worked outdoors in farmwork or on the waterfront, and he has never held clerical or sales jobs, or positions dealing with people. TR 41-42.

ANALYSIS

The employer has stipulated that the claimant was employed on the date of the injury, that the claim arises under the Act, that the neck and mid-upper back injury arose out of employment, and that the claim was timely filed. All these stipulations are supported by the weight of the record and I adopt them as findings of fact. The issues in dispute are the nature and extent of the permanent disability, the average weekly wage, the date of maximum medical improvement, and the claimant's need for psychiatric medical care. The employer also requests relief under section 8(f) of the Act.

Date of Maximum Medical Improvement

A disability is considered permanent on the date a claimant's condition reaches maximum medical improvement. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988).

The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition, even if the treatment is ultimately unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

Dr. Stark stated that the claimant's lumbar spine condition was permanent and stationary as of January 16, 1997, when Dr. Blackwell stated that the claimant was ready for retraining. CX G at 54; *see also* CX C at 18 (report of Dr. Blackwell stating that the claimant will probably not be able to return to the waterfront and is ready to begin some sort of retraining). At this point, the claimant's neck condition had also stabilized. *See* CX F at 44 (report of Dr. Sanders listing the claimant as permanent and stationary); CX G at 54 (report of Dr. Stark of January 5, 1998). Dr. Blackwell did not opine a specific date of maximum medical improvement. However, he did make two statements that are consistent with finding January 16, 1997 to be the date the claimant became permanent and stationary. In a report of February 13, 1997, he stated that the claimant "is not going to be able to resume work," and that there was nothing else he could do for the claimant. CX C at 20. Additionally, in his report of November 4, 1996, he noted that Dr. Sanders had found the claimant permanent and stationary, but that the claimant was continuing to have problems and that he was concerned about the lower back and radiation of pain from his neck into his left lower extremity. *See* CX C at 16-17, 21. However, by his report of January 16, he had determined there was little else he could do for the claimant. *See* CX C at 18. Based on this evidence, I conclude that January 16, 1997 was the date the claimant's condition became permanent and stationary.

Nature and Extent of Injury

A worker's injury is not compensable unless the injury arose out of and in the course of his employment. Claimants are aided under the Act by section 20(a), which provides that "it shall be presumed, in the absence of substantial evidence to the contrary . . . (a) that the claimant comes under the provisions of the Act." To invoke the presumption, a claimant must show by some evidence, but not necessarily by a preponderance of the evidence, that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. *Kalaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990). The employer then has the burden of rebutting the presumption by presenting substantial evidence against a relationship between a claimant's injury and its alleged cause. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue on the record as a whole, with the ultimate burden resting on the claimant. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). In this case, the employer has admitted that the claimant's neck and back injury were caused by the accident. The

employer, however, contends that the claimant's knee pain and depression are not caused by the accident.

Claimant's Knee Pain

There is some confusion over whether the claimant is alleging a specific separate injury to his left knee, or simply that he has pain generally in his left lower extremity, which includes his knee, that relate to his neck and back injuries. At any rate, the employer contends that the claimant did not suffer an injury to his knee in the accident on June 22, 1995, and has presented evidence that there is no objective physical evidence of a specific knee injury and that no complaints of knee pain were recorded until seven months after the accident. *See* CX G at 52-53 (report of Dr. Stark from January 5, 1998 finding no objective problems with the knee and stating that if there had been an injury to the knee there would have been complaint's earlier); EX 35 at 20 -24 (testimony of Dr. Blackwell that it was not until November of 1996 that the claimant told he was having problems with his left knee and previous to this he did not see any evidence of knee problems); TR 378-379 (testimony of Dr. Blackwell that he could find no objective evidence of a knee problem and an MRI of the claimant's knee revealed no abnormalities). Because this evidence is convincing as well as uncontradicted, I find the claimant has failed to establish that he is entitled to the presumption under section 20(a), and therefore that he has suffered no separate knee injury.

However, I find that the claimant has established sufficient evidence to invoke the presumption that he has some form of disability in his left lower extremity that is related to his overall injury to the neck and back. There are three reasons for this conclusion.

First, from the first treatment for his injury in June of 1995 and throughout that treatment the claimant has complained of leg pain. For instance, the claimant credibly testified that he complained of pain on his entire left side immediately after the accident, and on his first visit to Dr. Blackwell filled out a pain chart completely on the left side, including the lower extremity. TR 53. This testimony is supported by Dr. Blackwell's first report of June 22, 1995, in which he noted that the claimant came to him because of he had pains that were not being addressed, including "radiating numbness into his hand and left leg." EX C at 4. Dr. Blackwell also testified that during the July 24, 1995 examination the claimant complained of pain radiating generally into his left hand and leg. TR 323. Dr. Blackwell also wrote in his report of November 18, 1996 that the claimant "did not complain to me specifically of a knee problem when initially seen. He did, however, in the figure diagram when I review it, indicate that he had some problems with his left leg, but not specifically the knee." CX C at 17. Additionally, Dr. Stark testified at trial that the claimant complained of low back and leg pain during his initial examination from Dr. Blackwell. TR 633.

Second, Dr. Blackwell testified that it is likely that the claimant does not have a specific knee problem, but rather has general leg pain that is related to his lower back injury, rather than a separate and distinct injury. TR 331-332, 382. Dr. Blackwell testified that he does not know the

exact cause of his weakness in the claimant's lower extremity, but that it could be a function of disuse, or a function of the claimant's radiculopathy, which can cause weakness in a lower extremity. TR 332. He testified that the knee pain could be a function of muscle insufficiency in the thigh, which can cause knee pain and swelling, and that the muscle insufficiency could be caused by his back injury because it resulted in back pain and a lessening in activity. TR 333-334. Dr. Stark also admitted that radiculopathy can lead to radiation of pain into the knee. TR 643. [2] As the claimant currently described his pain, it is not in his knee specifically, but "from my head all the way down my left side . . . all the way down to my foot." TR 63.

Third, as Dr. Blackwell pointed out, the claimant is very inarticulate and throughout his treatment has had difficulty pinpointing his symptoms. Therefore, it is most likely that he simply has pain in his left lower extremity that relates to his back injury and that he has not adequately described it, or his confusing descriptions of it led Dr. Blackwell to explore a possible knee problem. For instance when Dr. Blackwell first discussed the claimant's knee pain on November 4, 1996, he stated that the claimant was not "a very conversant person. It is very difficult for him to indicate to me at this time whether the pain is as a result of radiating pain from the spine as opposed to pain isolated in the knee." EX C at 16. He also wrote later that the claimant was not very articulate and did not express himself very well and he was therefore giving him "the benefit of the clinical doubt," and requesting an MRI. *Id.*

Other than the evidence offered contradicting a specific left knee problem, the employer has failed to offer evidence against the claimant's allegation that his back injury caused pain throughout his left side and left lower extremity, and has therefore not overcome the section 20(a) presumption.

Claimant's depression

A psychological impairment can be an injury under the Act if work-related. *Director, OWCP v. Potomac Elec. Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (work injury results in psychological problems, leading to suicide); *Tezeno v. Consolidated Aluminum Corp.*, 13 BRBS 778, 782 (1981) (stating that a psychological impairment is compensable where a work-related accident has psychological repercussions); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984) (benefits allowed for depression due to work-related disability); *Moss v. Norfolk Shipbuilding & Dry Dock Corp.*, 10 BRBS 428 (1979) (although claimant's anxiety condition is not an occupational disease, it is compensable as an accidental injury).

In this case, I find that the claimant has established that he has a compensable psychological impairment.

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[2] While Dr. Stark stated that a person could have some radiation of pain into the knee, he stated that one should not feel specific knee pain or tenderness leading to cortisone shots. TR 643. However, I note that Dr. Blackwell gave the claimant the cortisone shots in an attempt to determine whether the knee pain was specific to the knee or more general. *See* CX C at 16-17.

In *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the Benefits Review Board rejected the argument that a claimant must affirmatively prove the psychological condition was caused by the work, and held that a claimant is entitled to the section 20(a) presumption for a psychiatric injury once it establishes the prima facie case. I find that in this case, the claimant has met this initial burden.[3] First, the reports and testimony of numerous doctors that the claimant suffers from depression, somatoform disorder, and dementia are sufficient under the "some evidence" standard in *Brown v. I.T.T./Continental Baking* to establish a presumption that the claimant has a psychological impairment. *See* TR 236-237 (testimony of Dr. Jed Sussman that the claimant suffered from depression and dementia), EX 38-39 (reports of Dr. Sigal and Dr. Pope stating that the claimant has mild depression and somatoform disorder), CX C (reports of Dr. Blackwell stating the claimant is severely depressed), CX I (report of Dr. Davenport stating the claimant has severe depression). Second, the claimant has established under the "some evidence" standard in *Brown v. I.T.T./Continental Baking*, that his psychological impairment is related to the injury he suffered at work in June 1995 based on his own testimony and that of Dr. Davenport. The claimant testified that having worked for over 35 years in one job that he loved and was good at, when he became unable to perform that job because of his work injury of June 1995, he felt "[l]ike I'm just lost." TR 54. Dr. Davenport also linked the claimant's current depression with the loss of his job, stating that the claimant was "a very proud, self-sufficient individual who has worked basically all of his life, and he now feels that he is in a position now where he can't take care of himself in a normal fashion." CX I at 64.

As the Board held in *Sinclair*, once the Section 20(a) presumption is established, the burden shifts to the employer to offer substantial countervailing evidence that the claimant's psychological condition does not exist, or that severs the potential connection between the disability and the work environment. *Sinclair, supra*. To rebut the presumption the employer must present specific and comprehensive medical evidence proving the absence of the condition or severing the potential connection between the disability and the work environment. *Hensley v. Washington Metro. Area Transit Auth.*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982); *Webb v. Corson & Gruman*, 14 BRBS 444 (1981); *Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980).

In an attempt to overcome the presumption, the employer argues that the claimant is malingering and faking his symptoms of depression in an attempt to avoid returning to work. The employer offers the testimony of Dr. Sigal and the reports of Dr. Sigal and Dr. Pope. Dr. Sigal

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[3] It should also be noted that the claimant does not have to prove the his depression resulted solely from the work injury, rather when the work injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)*; Kooley v. Marine Indus. N.W.*, 22 BRBS 142 (1989). The term "injury" includes the aggravation of a pre-existing, non-work-related condition or the combination of work- and non- work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988).

testified that there were inconsistencies in the claimant's test results because he performed very well on some, and very poorly on other tests, and that there were inconsistencies in his MMPH test, all of which indicated the claimant might be malingering. TR 463-64, 468-70, 511-512. *See also* EX 37-38 (reports of Drs. Pope and Sigal concluding that the claimant might be malingering and that there are many inconsistencies in the claimant's psychological test results). However, I find that this evidence is insufficient to sever the connection between the claimant's depression and the work accident. The employer's evidence, which primarily attempts to rebut the severity of claimant's mental illness, indicates that the claimant has at least some psychological impairment which was caused by his inability to return to his previous employment because of his physical injuries. There are three reasons for this conclusion.

First, the employer has not established that the claimant was malingering and faking his depression. While both Dr. Pope and Dr. Sigal stated that malingering should be considered, neither said that he was malingering. For instance, Dr. Pope noted in his report that a "relatively gross and unsophisticated attempt at malingering would have probably involved the patient displaying great difficulty on all tasks certainly including the more difficult ones." EX 38 at 471. Dr. Pope also stated, "I am unable to give a definitive opinion as to the specific causes of the patient's most unusual test performance." EX 38 at 471. In contrast, Dr. Sussman offered a definitive opinion that the claimant was not malingering, because he found that the claimant's test results were very consistent, and that the claimant did not evidence any of the typical behaviors of a person who is malingering, such as complaining or putting in too much effort. TR 252-253. I also note that in rendering his opinion that the claimant might be malingering, Dr. Sigal apparently did not consider whether the claimant was suffering from chronic pain, or to what extent that might be causing his depression, or the affect pain management drugs might be having on his psychological condition. TR 478-480, 490-492.

Second, all the doctors involved felt that the claimant suffers from at least some depression. While Dr. Sigal and Dr. Pope argued that the claimant did not suffer from dementia and might be malingering, they both diagnosed the claimant with mild depression and undifferentiated somatoform disorder.[4] *See* EX 37 at 459, EX 38 at 472. *See also* TR 454 (testimony of Dr. Sigal that the claimant was suffering from some depression). Indeed, Dr. Pope stated that the diagnosis of depression would be true even if the claimant was malingering. EX 38 at 472. Moreover, the claimant presented substantial evidence that he is in fact suffering from

[4] Somatoform disorder is a disorder in which physical symptoms can not be explained by any objective evidence, and is different from malingering in that the physical symptoms are not under voluntary control. In addition to Dr. Sigal and Dr. Pope's diagnosis of somatoform disorder, Dr. Blackwell also stated in a report that the claimant was "most assuredly depressed psychologically. . . . and it is my opinion that his depression is affecting the level of his symptoms;" and in another report wrote that the claimant was "clinically depressed," had "persistent complaints of pain involving the entire left side," and that he could not fill out a disability certificate for this pain because of the "non-organic component to his complaints." CX C at 22, 24.

depression. For instance, Dr. Sussman testified that he gave the claimant the MMPI and the results were consistent with a person that is depressed. TR 248.

Third, the employer's doctors have failed to offer persuasive evidence which severs the relationship between the claimant's depression and the work accident. On the contrary, Dr. Sigal even stated in his report that the "industrial accident of 6/22/95 is one of the causes of [the claimant's] psychiatric problems (his depression and somatizing)." EX 37 at 459. And the claimant offered extensive testimony and reports linking his depression with the work injury. Dr. Sussman testified that the claimant's depressive disorder was generated by the claimant's injury because there was no indication of depression in his medical records over the previous 20-30 years prior to the accident. TR 253-254. In his report from November 19, 1997, Dr. Davenport stated that the claimant was "a very proud, self-sufficient individual who has worked basically all of his life, and he now feels that he is in a position now where he can't take care of himself in a normal fashion." CX I at 64. There is also the claimant's testimony cited above that since he lost his job on the waterfront he has felt lost. Additionally, the coincidence in timing between the claimant's injury and his development of depression, and the gradual progression of his depression as the time increased in which he was unable to work, also support a link between the work injury and the claimant's depression. For instance, Dr. Blackwell testified that he has seen a progressive deterioration in the claimant's depression over time.

Because the claimant has established that he is entitled to the section 20(a) presumption that his depression is related to the injury he suffered working for the employer, and because the employer has failed to rebut it, I conclude that the claimant suffers from psychological condition which is related to the injury he suffered at work in June 1995.

Nature and Extent of Disability

A claimant who is contending that he is totally disabled has the burden of proving a *prima facie* case of total disability by showing that he cannot return to his regular employment due to the work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980; *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). In this case the employer has conceded that the claimant cannot return to his former employment as a transtainer operator, and as that conclusion is supported by substantial evidence I adopt it. Once the claimant has met that burden, the employer must then establish the existence of specific and realistic job opportunities within the claimant's geographic area, which a person of the same skills and experience as the claimant would be capable of performing and could secure if he diligently tried. *Bumble Bee*, *supra*; *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). In considering whether a claimant has the ability to perform particular work, a fact-finder must consider the claimant's physical restrictions, technical abilities and verbal skills, and consider the claimant's age, education, and background. *Hairston, supra*, at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990); *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993); *cert. denied*, 114 S.Ct. 1539 (1994). Additionally, the employer must establish the

claimant's earning capacity by at least establishing the pay scale for alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978); *Dupuis v. Teledyne Sewart Seacraft,* 5 BRBS 628 (1977).

While Mr. Williams cannot return to his usual and customary employment, the employer argues that consistent with his physical and psychological restrictions he could return to work in the longshore industry, or to some alternative employment. Thus I must initially determine the claimant's restrictions.

Dr. Blackwell, in a report of March 7, 1996, restricted the claimant from repetitive bending, lifting, and twisting; from lifting more than 40 pounds, from pushing and pulling, from climbing ladders or stairs, and generally from overhead work based on the problem with his left upper extremity. EX 35 at 10-13, 27. Dr. Blackwell based his restrictions on the claimant's persistent problems with pain, the MRI and EMG findings of anatomical abnormalities, and stated that all these restrictions were related to the claimant's problems with his spine. EX 35 at 10.

Dr. Stark suggested similar restrictions for the claimant, restricting him from keeping the neck in one position for a prolonged period, avoidance of a prolonged or repetitive upward gaze, and avoidance of heavy lifting. CX G at 53-54. These restrictions were based on the claimant's lumbar spine condition, his limited range of motion in the spine and the cervical spine condition, which he estimated generates a 50 percent loss in lifting capacity. CX G at 54. Similarly he testified that the claimant could not return to "certain longshore activities such as driving and traditional activities requiring bending and lifting." *Id.*

The claimant also offered the testimony of vocational expert Marc Joseph Rabideau, a physical therapist for 25 years, who performed a two day functional capacity assessment of the claimant for 6 to 7 hours each day in February 1996. TR 132, 133, 138. Mr. Rabideau also reviewed all the medical records in the case and discussed the claimant's condition with Dr. Blackwell. TR 138-139. Mr. Rabideau extensively measured the claimant's physical limitations through a variety of tests. TR 138-140. According to these tests, Mr. Rabideau described the claimant's restrictions as a diminished left hand grip strength, and pain in his left neck and shoulder when he gripped hard, TR 149; an inability to lift above ten pounds, TR 152; that the claimant had trouble with crawling, kneeling and climbing, TR 153-154; he had difficulty stair climbing that resulted in an excessive heart rate, TR 154-155; that he could not tolerate repeated lifting, TR 155; repeated rotation of the head, TR 155; would not be able to tolerate the vibration of driving equipment, TR 156; no repeated twisting and turning, TR 156; no repeated overhead reaching, TR 156; would not be able to climb and reach up to pull himself up because he does not have the trunk stability, arms strength or shoulder movement, TR 156; and could not work in an area with lots of traffic because of his decreased mobility; TR 156; that the claimant requires his cane to walk and has a very limited standing tolerance, TR 157-158; that the claimant could not tolerate a job where he had to stand or sit all day, TR 157-158; and based on the Perdue peg board test and the Bennet Hand test, has very little dexterity or hand control, TR 157-158.

After reviewing Mr. Rabideau's Functional Capacity Assessment, Dr. Blackwell testified that he would amend his restrictions to not lifting more than 10 pounds and not pushing or pulling more than five pounds. TR 388-389. He also testified that he would still restrict the claimant from prolonged standing, walking, squatting, or kneeling. TR 389.

When considering medical evidence in proceedings under the Longshore Act, a treating physician's opinion is entitled to be given "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (clear and convincing reasons must be given for rejecting an uncontroverted opinion of a treating physician). As Dr. Blackwell is the claimant's treating physician, his opinion on the claimant's restrictions is given special weight. Based on the reports of Dr. Blackwell, Dr. Stark and Mr. Rabideau, I find the claimant's physical restrictions to be: no lifting above ten pounds; no pushing and pulling more than five pounds; no climbing ladders and stairs; no general overhead work; no prolonged maintenance of the neck in one position; no extensive crawling or kneeling; no prolonged standing; and no work in areas where mobility is required.[5]

However, the claimant also has additional emotional and social limitations. For instance, based on his objective tests, Dr. Sussman stated that the claimant had a very hard time coming up with words and phrases, TR 246, and that the Wechsler's Memory Scale showed the claimant had an extremely low level of memory functioning. TR 247-248. In addition, the claimant points out that he has never had a job before that was not outside, TR 42, and that he has never used a computer or ever typed. TR 86. Additionally, while Dr. Sigal stated that the claimant's psychiatric problems do not limit him from returning to work, EX 37 at 459, TR 456, I find that his depression and attitude should be considered in determining whether a job is appropriate. Finally, the claimant's current use of heavy medication including vicodin, headache pills, and occasionally anti-depressants must be considered. *See* TR 125.

I will now consider the jobs suggested by the employer as potential alternative employment for the claimant:

Alternative Longshore Work:

The employer listed three specific potential longshore jobs for the claimant, pinman, tractor driver and extra walking boss that would be available to the claimant from the dock preference board.[6] Mr. Stan Hazlak, an insurance investigator who formerly worked with

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[5] I have considered Dr. Stark's testimony that the claimant could lift 30 pounds and 20 pounds repetitively, TR 575, but have found Dr. Blackwell's and Mr. Rabideau's more convincing.

[6] The employer offered exhibits describing almost ten different longshore jobs. See EX 23-33. While it is difficult to tell if the employer meant to offer each of these jobs as an alternative employment, because Mr. Hazlak has only testified as to the availability of the three

American President Lines and is familiar with the duties of these longshore positions at the Oakland terminal, testified for the employer on the availability of these jobs. TR 173-175.[7] However before turning to discuss the three longshore positions offered by the claimant, it must be noted that the employer's expert Mr. Hazlak admitted that he does not know which individual jobs of the three were available when or how often, and thus the claimant would not know which of the three positions he could expect to do in any given day. Therefore, I would have to find that the claimant could do each of the three positions to find that any of the longshore positions are appropriate employment.

1. Pinman

Mr. Hazlak testified that one job for a dock preference worker is a pinman. TR 209. The pinman is on the dock and generally working near the crane, removing pins from the bottom of containers and observing work that is done on the dock. TR 185. Mr. Hazlak stated that a pinman takes the cones out of a box and puts it on the corner castings of the container, and might do this for 25-30 boxes an hour. TR 210.

Dr. Blackwell went to the facility to observe the three positions the employer argues are appropriate for the claimant in person and testified that he observed actual pinman and tractor drivers and dock clerks working, TR 362-364. He observed a pinman bending over to pick cones out of a box that weighed between 15-20 pounds. He would then pick up the pin and walk 30-40 feet with it, to the other end of a container. Dr. Blackwell testified that the claimant could not do the job because it is done at a rapid pace, because the bending could cause excessive strain on the back, because it requires good mobility, and because it involves repetitively lifting 15-20 pounds. TR 365-367. He also testified that the claimant could not handle the standing that would be required in the position, because he has a demonstrable weakness in both the left upper and lower extremity. TR 367-368. He also stated that the job requires one to look up often, more often than Mr. Williams could tolerate. TR 369.

Mr. Ivan Olson, currently a walking boss for the employer, also testified that the cones a

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above jobs, these are apparently the only longshore jobs the employer is alleging the claimant can perform.

[7] He testified that a longshoremen, which the claimant would be, who make themselves available to work on the dock preference board, get a pay guarantee if they show up to work and no work is available. TR 177-178. He stated that he reviewed the PMA records of 1997 and1998 for the jobs of tractor driver, extra walking boss, and dock preference workers. TR 188. By determining when jobs went to non-A registered workers, the amount of work available for A workers can be determined, because if the job went to a non-A worker, there must have been no A workers left to take the position. TR 187. *See also* EX 40. In 1997, there were 48 days where there was no work available to the first shift and 3 in 1998; in the second shift, there were 134 days in the first shift where there was no work available and 17 in 1998. TR 190.

pinman carries weigh 17 to 20 pounds, and that the cones may have to be lifted about eye level to insert it on a chassis. TR 735, 739.

Because of the pinman position requires the lifting of cones that exceed the restrictions placed on the claimant, and based on the testimony of Dr. Blackwell, the claimant's treating physician, I find that the claimant can not perform the job of pinman.

2. *Tractor job*

The tractor driver drives around and picks up containers. The employer's witness, Mr. Hazlak, testified that he is familiar with the potential dangers for tractor drivers and one of those was the vibrational level of the tractors. TR 181. [8] He also admitted that different facilities have different terrains and that some have potholes and uneven ground. TR 221. The claimant also testified that he has worked as a tractor driver often, and that the job requires driving over uneven surfaces and potholes which cause frequent vibrations. TR 70-72. I conclude that the position apparently involves vibrational levels that are likely to exceed the tolerances of the claimant's back.

The claimant testified that to get into the tractor, the driver must climb up a little stairway and grab a handle bar and pull himself in. TR 80. While there is a debate over exactly how a tractor driver hooks and unhooks his air hoses, either way the claimant would be required to frequently get out his cab and go through a cab door, which would require him to stoop.[9] The tractor position may at times involve a jarring motion, and appears to be a physically demanding job. While Mr. Hazlak stated that you should not have to slam to get the fifth wheel underneath the chassis, I find that his testimony is outweighed by that of Dr. Blackwell, the claimant and Mr. Olson. TR 220. Dr. Blackwell testified that he would not allow the claimant to work as a tractor operator and that when he observed the tractor operator picking up the boxes, the tractor hit the chassis with a jarring motion, causing an impact and a to and fro movement of the body with each impact. TR 376. The claimant stated you have to be in good shape for the tractor position. TR 70. Mr. Olson also testified that tractor job is physically taxing and involves jarring and banging. TR 747. Finally, the tractor driver position probably would require the claimant to back up often, which would require him to turn around and look over his neck to see. *See* TR 627-28, 771-72. Based on this evidence, I find that the tractor job is unsuitable for Mr. Williams.

3. Extra walking boss

Mr. Hazlak testified for the employer on the position of walking boss. TR 184. He

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[8] While he testified that he thought the vibrational levels were less than similar tractors on the highway, he admitted he has never ridden in a tractor in the waterfront. TR 182-184.

[9] A tractor driver has to hook/unhook airhoses for every container lifted, and he lifts about 30 containers per hour. TR 77-78.

stated that a walking boss supervises the work being performed by longshore workers and insures that the vessel is loaded or unloaded properly. The walking boss may ride around in a vehicle or walk around on the ship or on the dock. TR 186. Mr. Hazlak admitted that the walking boss position includes many different jobs with different physical demands, and that a person cannot select which walking boss job he will be assigned. TR 201. I find that the claimant could not perform the position of walking boss because it sometimes involves climbing of gangways, extensive walking around docks and ships where there are many tripping hazards, and frequent looking above. Mr. Hazlak admitted that a walking boss has to climb gangways to get onto a ship and back off and that he has seen many accidents where people tripped over equipment on the catwalks or stepped into the openings in gratings. TR 202-204. He also admitted that a walking boss has to be mobile and have balance. A walking boss has to be able to look up into the air to make sure the right box is being loaded/unloaded, and to make sure it does not drop. This must be done every time a box comes in, which is about 25 boxes an hour, and can go from as far as five stories high to eight stories down. On occasion, the walking boss must bend down to look into the hatch. TR 204-205. Additionally, Dr. Blackwell testified that he observed a crane boss (apparently a walking boss can be a ship boss or a crane boss) in action and that the crane boss had to walk around the ship a lot, go up and down ladders periodically, and pass many tripping hazards. TR 369-371. He testified that the claimant could not do the job, because of his muscle insufficiency, limited range of motion, and guarded mobility. TR 372-373. In contrast, Dr. Stark observed that the claimant can handle a position that required climbing gangways, ladders, and stepping over turnbuckles and latching equipment. However, Dr. Stark based this opinion from his review of the testimony of Dr. Hazlak. I give more weight to Dr. Blackwell's opinion because he actually went to the worksite, he has greater experience with the claimant and his limitations, and because he was the treating physician.

I also note the testimony of Mr. Olson, who is the head day walking boss for the employer, who stated that a walking boss goes up and down a gangway onto a ship, has to get up between the rows of containers to make sure they are properly lashed or unlashed, has to climb ladders, and has to walk up narrow bridges that are about eight feet high. TR 726, 743-744.

Based on the testimony above, I conclude that the claimant could not perform the job of walking boss.

Alternative Employment Outside Longshore Work

The employer also argues that other jobs are available to the claimant based on Employability Study Report of Ms. Winkler. EX 16. Ms. Winkler reviewed all medical records in this case, the claimant's deposition, and eventually, on October 13, 1998, interviewed the claimant for an hour and a half. TR 662-663. However, she did not perform any vocational testing of the claimant herself. Her report stated that several employers were contacted who, based on a description of the claimant, would have accepted and considered his application and expected him to be able to perform the duties. These jobs included, telemarketer ($10 an hour), a

position with California Energy contacting potential customers ($6 to 9 an hour); three different security guard positions paying $8 to 9 an hour, $7.25 to 12.00 an hour, or $7.25 to 8 an hour; a cashier position ($8.76 to 9.30 an hour); and gas station attendant position ($6.00). Ms. Winkler subsequently prepared two updates to the Report, both dated January 27, that responded to the claimant's objections to these positions. The first asserted that the potential employers listed had been contacted and had provided with a description of the claimant that included his work background, physical limitations, and apparent depression symptoms. EX 34. This update documented jobs where the employer would, were it not for the claimant's memory problems, consider the claimant and possible accept him. EX 34. In her second update, she listed the employers who would consider the claimant even though he was described as having severe memory problems.

In opposition, the claimant presented the testimony of Lorian Ink-Hyatt, who has been a vocational consultant since1979. TR 296-297. She reviewed the claimant's medical reports, had two interviews with the claimant, and prepared a report February 26, 1999. TR 299. She contacted the employers set forth in Ms. Winkler's feasibility study. TR 301. The claimant also presented the testimony and reports of Mr. Rabideau, Dr. Sussman and Dr. Blackwell on these positions. In considering these positions below, I first note that I am not considering the claimant's possible problems with memory as a restriction, only his personality limitations, his limited social skills, and his problems with depression.

1. Telemarketer (appointment setter in Updates)

Ms. Winkler contacted Insul-Tex in Livermore, a job where the claimant would have to contact homeowners and setup appointments for sales people over the phone. The qualifications needed were excellent customer service skills and an ability to be trained on the job. She also contacted California Energy, where the claimant would be required to contact potential customers for a custom window and door company and explain the services and arrange the appointments. *See* EX 33. Ms. Winkler contacted West Coast Publications about a job contacting current subscribers regarding subscription renewals. All work in this position, however, would be over the phone. *See* EX 33. Qualifications for the job were described as "upbeat," and with customer service capabilities. In her first update to the Employability Study Report, she also contacted the Performance Measurement Company, about a telemarketing job that required employees to contact businesses and conduct telephone surveys, but apparently did not require selling of products. EX 34. The job required the applicant to have adequate English skills and basic data entry skills. Ms. Winkler stated that the telemarketing jobs are not sales jobs, but only set up appointments or ask questions. TR 676, 681.

Ms. Hyatt contacted the two telemarketers, California Energy and West Coast Publications in Concord. These employers stressed the importance of an excellent command of the English language, good telephone skills, the ability to establish rapport with the other individual, the ability to respond rapidly to objections that might come up by the person you are soliciting, and an outgoing extroverted personality. TR 302-303. It was also her understanding

that memory was essential to the job. TR 303-304. She also consulted the Enhanced Guide for Vocational Exploration, a reference took frequently used by vocational consultants, with a Dictionary of Occupational Titles, which under telemarketer includes influencing people, maintaining attitudes, making judgement decisions, and dealing with people as requirements for the job. TR 302. Dr. Blackwell testified that the claimant would have problems being a telemarketer position because of his personality. EX 35 at 37-38. Dr. Sussman testified that the claimant could not do the job of telemarketer because telemarketers have to be persuasive, glib, enthusiastic, fast thinking, tolerate stress, and that with the claimant's depression, cognitive limitations, and chronic pain, he could not succeed. TR 257.

Dr. Sigal stated that the claimant could do work that required him to meet with, or deal with the public. TR 439. However, I find that his testimony is less convincing that Dr. Blackwell and Dr. Sussman, both of who spent more time interviewing the claimant. Dr. Sigal based many of his conclusions about the claimant's personality by observing him during the trial or in the hallways during the trial, rather than on psychological or vocational testing. *See, e.g.*, TR 500. I also note that Ms. Winkler did not specifically test the claimant's verbal skills, which are crucial in his performance for this job. TR 711-712. In contrast, Dr. Blackwell is familiar with the claimant's verbal skills from his long treatment of the claimant, and Dr. Sussman, besides interviewing the claimant for much longer that Ms. Winkler (2 days vs. 1.5 hours) tested the claimant's verbal abilities.

I find telemarketing to be unsuitable because of Mr. Williams' poor language skills and difficulty dealing with people.

3. Machine Shop Helper

Ms. Winkler contacted Promex, a machine shop. She described the job as requiring rare to occasional lifting up to 20-30 pounds, with minimal bending/exertion outside the claimant's limitations, and that dependability "is the most important asset." EX 33.

Ms. Hyatt also contacted Promex, and was told that they did not have any openings. TR 304-305. Additionally, under the Dictionary of Occupational Terms, she testified, a machine shop helper must be able to stand, walk, and lift in a medium category, which means that they can lift up to 50 pounds repetitively. TR 305. Because there is some question about whether this position is still available, and because it seems to exceed the claimant's lifting restrictions, I find that it is unsuitable.

4. Security Guard.

Ms. Winkler contacted Royal Investigations and Strategic Security. Both apparently required no experience and had no other requirements. EX 33. She also listed in her first update, two other security job positions for employers that would apparently not be concerned if the claimant had severe problems with his memory loss. EX 34.

Dr. Blackwell testified that the claimant could not now perform the duties of a security guard because his problems engaging the public had worsened, because if something were to happen the claimant would have trouble reacting and might not be alert enough to respond if he is on medication, and because there is a "progressive deterioration from a psychological standpoint" in the claimant. TR 377. Dr. Sussman testified that there was no way the claimant could be a security guard, because they are often put in stressful situations, have to think fast and have to deal with people in a way that requires intellectual capacity, and because in an emergency situation, the claimant might be hampered by slowness in his thinking, depression, and stress intolerance. TR 257-258. Ms. Hyatt testified that, under the Enhanced Guide, a security guard must be competent in dealing with persons, be able to do repetitive tasks, perform effectively under stress under an emergency situation. TR 305-306. Dr. Stark also stated that if the security guard position included the possibility of an altercation, then the claimant should not do it. TR 587. I also note that Ms. Winkler apparently did not ask the potential employers about the claimant's use of pain medication and possible use of anti-depressants. *See* EX 33.

Based on the above testimony, I find this position unsuitable.

5. Cashier

Ms. Winkler's first update and original Employability Study Report also include two cashier jobs, which were both later dropped when she informed the employers that the claimant had significant memory problems. Nonetheless, because I am not considering the claimant's memory loss as a restriction, I will consider the cashier positions. While Ms. Winkler's reports state that the claimant's limitations and personality issues were presented to the potential employers, I find more convincing the testimony of Dr. Blackwell and Mr. Sussman that the claimant could not do the cashier positions. Dr. Blackwell testified that the claimant would have problems with the cashier and telemarketer positions, because of his personality, EX 35 at 37-38. Dr. Sussman testified that the claimant could not do the cashier job because cashiers have to deal with the public, must perform many more tasks than just running items through a scanner, and must correct mistakes with the cash register or the input. TR 258. I have considered that Dr. Sigal stated that the claimant could do work that required him to meet with or deal with the public, TR 439, however, I find that his testimony is less convincing that Dr. Blackwell and Dr. Sussman, both of who spent more time interviewing the claimant.

Because I find that none of the jobs suggested by the employer are appropriate for the claimant, I find that the employer has failed to meet its burden of proof and that the claimant has established entitlement to permanent total disability benefits under the Act.[10]

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[10] However, I am not adopting Dr. Sussman's conclusion that the claimant is incapable of returning to the open labor market, as both Dr. Sigal and Dr. Blackwell testified that the claimant could return somewhere to the labor market. I hereby conclude the employer has not offered a specific job that the claimant could perform, and therefore not met its burden. *See* TR 473. As Dr. Sussman stated, the claimant's depression will only improve by returning to work, if he

Average Weekly Wage

A claimant's average weekly wage must be determined under section 10(a), 10(b) or 10(c) of the Act. When a claimant has worked "more than 75 percent of the work days" in the year prior to his injury, there is a presumption that section 10(a) should be applied. *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057-58 (9th Cir. 1998). Under section 10(a) the average weekly wage for five day worker is determined by multiplying the average daily wage by 260 and dividing by 52.[11] In this case, even though both the claimant and the employer use the same PMA records as evidence and both apply section 10(a), they somehow computed different results for the claimant's average weekly wage. The claimant contends that his average weekly wage is $2,591.05, because he worked 244 days between 6/24/94 and 6/23/95 and over those 52 weeks, earned $126,444; which divided by 244 equals $518.21, and times 260 equals $134,734.60 which divided by 52 equals $2,591.05. *See* TR 15-16, CLAIMANT'S AMENDMENT TO CLAIMANT'S PRETRIAL STATEMENT, February 26, 1999. The employer says she added the same numbers and got $117,929.94 and an average weekly wage of $2,267.68. TR 22. Adding further confusion in the record is a second amendment to the claimant's pretrial statement, contending the average weekly wage is $2,640.40, with a total earnings of $128, 852. Looking at the PMA records shows that in his second amendment, the claimant has added up the previous 54 weeks of earnings to reach a figure of $128,852, and that by subtracting the oldest entry, the figure of $126,444, which is the figure in the first amendment, is reached. Thus by simply subtracting the next oldest PMA weekly earning, we reach a figure of $124,496.22. This yields an average weekly wage of $2,551.15. Because the employer has offered no evidence regarding how it reached its figure of $117,929.94, I adopt claimant's computation of $2,551.15 as his average weekly wage.

Entitlement to psychiatric care.

Under section 7 of the Act, an employee is required to furnish an injured employee all reasonable and necessary medical treatment for his injury. A claimant establishes a prima facie case that the medical care is compensable if the evidence shows that a licensed physician has indicated that the treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac telephone Co.*, 16 BRBS 255 (1984). Because I have found that the claimant's depression is related to the injury he suffered in the work accident, he is entitled to reasonable medical care for that condition.

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returns to work successfully. *See* TR 283.

[11] While claimant typically worked enough hours to possibly be a six-day worker, 60 and sometimes 80 hours a week, and thus his average daily wage would by multiplied by 300, no evidence was offered or exists in the record on how many days per week the claimant typically worked. And because neither side has argued that the claimant is a six-day worker, I will assume he is a five-day worker. *See* EX 20.

Entitlement to Section 8(f) relief.

The employer argues it is entitled to section 8(f) relief under the Act because the claimant had documented pre-existing multilevel cervical spondylosis. The Director did not appear at the hearing, but on October 5, 1998, filed a position opposing the granting of section 8(f) relief. In order to obtain Special Fund relief, an employer must show: 1) that the claimant had a permanent partial disability prior to his injury with the employer; 2) that the pre-existing disability was manifest prior to that injury; and 3) that the injury with the employer could not be the sole cause of the claimant's ultimate permanent disability. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982).

In this case section 8(f) relief is not available to the employer because the first and second element have not been satisfied because the employer failed to submit any medical records documenting a pre-existing disability.[12] The first element can be satisfied if the employer shows that "because of a greatly increased risk of employment related accident and compensation liability," the pre-existing condition would motivate a cautious employer to discharge or refrain from hiring the employee. *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir. 1977); *Director, OWCP v. Campbell Industries, Inc., supra*; *Todd v. Pacific Shipyards v. Director, OWCP*, 913 F.2d 1426 (9th Cir. 1990). In this case, the employer offered no evidence that the claimant already had a cervical or back impairment, and it therefore appears there was nothing to motivate a cautious employer to not hire the claimant because of a fear of potential liability under the Act.

The second element can be satisfied if the employer shows that the claimant's pre-existing disability was manifest to the employer because the employer had actual knowledge of the condition or that medical records existed prior to the injury that would objectively show the claimant's pre-existing condition. *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616 (9th Cir. 1983); *Todd v. Shipyards Corp.*, 16 BRBS 163 (1984). These medical records do not have to indicate the precise nature of the pre-existing condition or it permanency, but are sufficient if they contain information regarding the existence of a serious lasting problem which would motivate a cautious employer to not hire the employee. *Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 225 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74 (1st Cir. 1992). Nor is it required that the claimant be actually impaired from working or symptomatic. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 310 (D.C. Cir. 1991). In this case, the employer has submitted no evidence that the pre-existing condition was manifest or that it had actual or constructive knowledge of a pre-existing condition.

For the sake of thoroughness, I note that the employer did establish the third element. The third element can be satisfied if the employer shows that the claimant's disability was

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[12] While the application to the Director for section 8(f) relief states that medical records of Kaiser Permanente Hospital were attached as exhibit B, no such records were submitted here. *See* EX 5 at 11.

materially and substantially greater than the disability would have been without the pre-existing disability. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 185 (4th Cir. 1993). The employer did submit the report of Dr. Stark stating the claimant's cervical condition resulted from its combination with a pre-existing condition. *See* CX G.

ORDER

Accordingly, it is ordered:

1. Respondents shall pay Willie Williams temporary total disability benefits from June 22, 1995 until January 16, 1997 based on an average weekly wage $2551.50.

2. Respondents shall pay claimant permanent total disability benefits from January 16, 1997 until otherwise ordered based on an average weekly wage $2551.50.

3. Respondents shall provide for all future medical care which is reasonable and necessary for the treatment of claimant's injuries.

4. Respondents shall receive credit for compensation payments previously paid for this injury.

5. Respondents shall pay interest on all due but unpaid compensation from due date to payment date, at the rate specified in 28 U.S.C. § 1961 on the date of the filing of this order.

6. The District Director shall make all calculations necessary to carry out this order.

7. Claimant's counsel may file and serve a fee and cost petition in compliance with 20 CFR § 702.132 within 20 days after the filing of this order. He shall thereupon discuss the petition with other counsel with a view to reaching an agreement on fees and costs. No later than 15 days after the filing of the fee petition, claimant's counsel shall file written notice of what, if any, agreements have been reached. Within 15 days thereafter, respondent's counsel shall file detailed objections to any unresolved items. Claimant's counsel may reply to the objections within 10 days.

ALEXANDER KARST
Administrative Law Judge

Dated: July 11, 2000
AK:pa